Reserved Judgment

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Reference No. 01 of 2007

State Versus Jiya Lal

Along with

Criminal Jail Appeal No. 07 of 2007

Jiya Lal

……..Convict/Appellant.

Versus

State of Uttarakhand

……..Respondent.

Sri Diwakar Chamoli, Amicus Curiae for the Convict/appellant.
Sri A. Rab, A.G.A. for the State.

Coram: Hon'ble Prafulla C. Pant, J.
Hon'ble Dharam Veer, J.

[Per Hon'ble Prafulla C. Pant, J.]

The above mentioned reference made under Section 366 of Code of Criminal Procedure 1973 (hereinafter referred as Cr.P.C.), and the appeal (No. 07 of 2007), preferred under Section 374 of Cr.P.C. have arisen out of the same judgment and order dated December 21/22, 2006, passed in Sessions Trial No. 97 of 2006 by learned Additional Sessions Judge, II, Dehradun, whereby, appellant Jiya Lal has been convicted under Sections 363, 376, 201 and 302 Indial Penal Code, 1860 (hereinafter referred as I.P.C.). The convict has been sentenced under Section 363 of I.P.C. to rigorous imprisonment for a period of seven years and directed to pay fine of Rs.5,000/-, under Section 376 of I.P.C. to imprisonment for life and to pay fine of Rs.5,000/-,

under Section 201 of I.P.C. to rigorous imprisonment for a period of two years and to pay fine of Rs.2,000/-, and sentenced to death under Section 302 of I.P.C., by the trial court. In default of payment of fine of Rs.5,000/- (under Section 363 of I.P.C.) the convict has been directed to undergo rigorous imprisonment for a further period of one year, in default of payment of fine of Rs.5,000 (under Section 376 of I.P.C.) he is directed to undergo rigorous imprisonment for a further period of one year, in default of payment of Rs.2,000/- (under Section 201 of I.P.C.) the convict is directed to undergo rigorous imprisonment for a further period of six months.

(2) Heard learned Amicus Curiae for the convict/appellant and A.G.A. for the State.

(3) Prosecution story in brief is that, on 16th March 2006 at about 7.15 a.m., P.W. 2, Rajendra Singh, lodged a report (Ext. A-1) with the Police Station Kotwali Dehradun that his brother Shiv Kumar's daughter Km. Sanjana, aged seven years, was missing since 2 p.m. of 15.3.2006. In the said report, it is mentioned that a search was made for the child, but in vain. It is further mentioned in the report that Km. Sanjana was seen by P.W. 3, Budhiram going with Jiya Lal (convict/appellant), who works in an ice factory. Endorsement of the said report was made in the general diary by the police (a copy of extract of which is Ext. A – 4). The police made search of the girl and interrogated the suspect Jiya Lal, who admitted having murdered the young girl (Sanjana) after committing rape on her. AT his instance, dead body of Km. Sanjana was recovered from a vacant plot near Bhawani Inter College. Police also recovered a shirt of Jiya Lal

and a piece of his sock from the said place. On return from the site an endorsement of this fact was made at Police Station in the general diary on 16.3.2006 at about 10.30 a.m., extract of which is Ext. A-6. After the above recovery, a crime No. 81 of 2006 was registered against the accused at the police station relating to offences punishable under Sections 302, 201 and 376 of I.P.C.. Accused Jiyal Lal was formally arrested at about 10.50 a.m. and arrest memo (Ext. A-9) was prepared. A police team headed by P.W. 7, Sub Inspector R.K. Chouhan, who recovered the dead body and the aforesaid articles, as mentioned above, took the dead body in their possession and inquest report (Ext. A-3) was prepared by the Police on the very day i.e. 16.3.2006 at about 11.30 a.m.. Police Form No. 13 (Ext. A-14), sketch of the dead body (Ext. A-15), Sample of seal (Ext. A-16) and letter requesting for postmortem examination (Ext. A-17) were also prepared by the Police and the dead body was sent for postmortem examination in a sealed cover. P.W. 5, Dr. A.K. Pathak, conducted the autopsy on the dead body on the very day i.e. 16.3.2006, at about 3.30 p.m. and opined that cause of death is ‘asphyxia due to throttling along with rape’, and he prepared postmortem examination report (Ext. A-7). The crime was investigated by P.W.8, Inspector M.S. Negi, who interrogated the witnesses and prepared the site plan (Ext. A-13). He took the cloths of the deceased in his possession and kept in a sealed cover and got sent the recovered cloths of the deceased and that of accused to the forensic laboratory for their examination. On completion of the investigation, the Investigating Officer submitted charge sheet (Ext. A-18) against the accused Jiya Lal for his trial in respect of offences punishable under Sections 376, 302 and 201 of I.P.C.

(4) The Chief Judicial Magistrate, on the receipt of the charge sheet, after giving necessary copies to the accused as required under Section 207 of Cr.P.C., committed the case to the Court of Sessions for trial. Learned Additional Sessions Judge, to whom the case is transferred for trial, after hearing the prosecution and the defence on 18.2.2006 framed charge of offences punishable under Sections 363, 376(2)(f), 302 and 201 of I.P.C. against accused Jiya Lal. The accused pleaded not guilty and claimed to be tried. On this, prosecution got examined P.W. 1 Miss. Preeti, aged 15 years, cousin of the deceased, who stated that she saw victim going with the accused, P.W. 2 Rajendra Singh, informant and uncle of the deceased, who lodged the report (Ext. A-1) regarding missing of Miss Sanjana (deceased), P.W. 3 Budhiram, a neighbour, who also stated that he saw deceased going with Jiya Lal, P.W. 4 Head Constable Rajkumar, who made entries in the general diary and proved extracts thereof viz. Ext. A-4, Ext. A-5 and Ext. A-6, P.W. 5 Dr. A.K. Pathak, who conducted the postmortem examination and prepared autopsy report (Ext. A-7), P.W. 6 Dr. Manoj Kumar Sharma, who medically examined accused Jiya Lal on 16.3.2006 and prepared report (Ext. A-8), P.W. 7 Sub Inspector, R.K. Chouhan, who made recovery of the dead body of Km. Sanjana, Shirt of accused and his sock from the said place and prepared memo Ext. A-2, and also prepared inquest report (Ext. A-3) and other necessary papers, P.W. 8 Inspector M.S. Negi, Investigating Officer and P.W. 9 Constable Clerk Virendra Singh. Oral and documentary evidence including the report of forensic expert were put to the accused Jiya Lal, under Section 313 of Cr.P.C., in reply to which he alleged the same to be false, however, he admitted that his cloths were taken

by the police. He further admitted that he was got medically examined. The accused alleged that he had enmity with Budhiram and Rajendra Singh and as such he has been falsely implicated in the crime. No evidence in defence is adduced on behalf of the accused. The trial court after hearing the prosecution and the defence found accused Jiya Lal guilty of charge of offences punishable under Section 363, 376(2)(f), 201 and 302 of I.P.C. AFter hearing on sentence, the trial court sentenced the convict Jiya Lal under Section 363 of I.P.C. to rigorous imprisonment for seven years and to pay a fine of Rs.5,000/- in default of payment of which the convict was directed to undergo rigorous imprisonment for a further period of one year. He is sentenced under Section 376(2)(f) of I.P.C. to imprisonment for life and to pay fine of Rs.5,000/- and in default of payment of fine was directed to undergo rigorous imprisonment for a further period of one year. The convict was further sentenced under Section 201 of I.P.C. to rigorous imprisonment for two years and to pay a fine of Rs.2,000/- in default of payment of the fine he was directed to undergo rigorous imprisonment for a further period of six months. The trial court awarded sentence of death as punishment to convict Jiya Lal under Section 302 of I.P.C., and made the reference to this Court for confirmation of said sentence. Also, the convict preferred appeal against the aforesaid judgment and order dated December 21/22, 2006.

(5) Following are the circumstances brought on record by the prosecution, against the accused Jiya Lal:

(i) Miss Sanjana, the victim, aged seven years, was attached to accused/appellant Jiya Lal.

(ii) Miss Sanjana, the victim was last seen going with accused/appellant Jiya Lal at about 2 p.m. on 15.3.2006 by P.W. 1, Miss Preeti, cousin of the victim and P.W. 3, Budhiram, neighbour of the victim, where after she was missing.

(iii) When she did not return in the evening, a search was made by the family members of the victim, but in vain and ultimately next day morning i.e. on 16.3.2006 at about 7.15 a.m. P.W. 2, Rajendra Singh, uncle of the deceased lodged a report with the Police Station Kotwali Dehradun that Miss Sanjana is missing and not traceable suspecting Jia Lal having taken the girl with him.

(iv) As it was mentioned in the report (Ext. A-1), lodged with the Police, that witness Budhiram had seen the girl going with Jiya Lal, he (Jiya Lal) was interrogated by the Police to know the whereabouts of the girl.

(v) As per the endorsement made in the general diary on 16.3.2006 at about 10.30 a.m. (a copy of which is Ext. A-6), it was disclosed by accused Jiya Lal that the girl did accompany him as he was known to her and he made disclosures to the Police where he had concealed the dead body of the victim (the accused is said to have confessed to the police the commission of murder while committing rape on the victim, but the same is not admissible in evidence).

(vi) Not only the dead body of the deceased was recovered at the pointing out of the accused Jiya Lal from a vacant plot near Bhawani Inter College, but

also his shirt and one sock left there, were recovered and recovery memo (Ext. A-2) was prepared by the Police in this regard.

(vii) In the disclosures made to the police as mentioned in Ext. A-6 accused Jiya Lal told that both the girl's father and he belonged to Eastern U.P., and had acquaintance.

(viii) On postmortem examination, as mentioned in autopsy report (Ext. A-7), it was found that there was bruising in labia maroza and minora of the victim. Also, spots of blood were seen. There was also bruising on inner sides of both thighs on upper part, and the Doctor, who conducted autopsy opined that cause of death was 'asphyxia due to throttling along with rape'. In the said report it is also observed that the vegina was filled with blood finged fluid.

(ix) On disclosures made by the accused and after registering the crime against him, he was arrested and medically examined. On medical examination of accused Jia Lal, at about 6.15 p.m. on 16.3.2006, two injuries of abrasion were found on the right knee which could have been caused at the time of commission of rape.

(x) The cloths of the victim and that of the accused Jia Lal were sent for chemical examination to the forensic laboratory and the report dated 19.4.2006 received by the trial court in which it was recorded that in the underwear of the accused (Article 6) and pantee (Article 8) of the deceased, human semen and spermatozoa were found.

(6) Before further discussions, it is pertinent to mention here the ante mortem injuries found on the person of the deceased as recorded in postmortem examination report (Ext. A-7) by P.W. 5 Dr. A.K. Pathak, after conducting autopsy on the dead body. The same are being reproduced as under:

(1) Brusing of labia maroza and minora. Spots of blood seen.

(2) Brusing of inner sides of both thighs upper part present. Red in colour.

On internal examination of generation organ, the medical officer found that the vagina was filled with blood finged fluid. According to Doctor the death of the deceased had occurred within one day. Dr. A.K. Pathak (P.W. 5) opined that 'cause of death is asphyxia due to throttling along with rape'.

(7) On medical examination of accused Jiya Lal, P.W. 6, Dr. Manoj Kumar Sharma, found following injuries on the person of the accused on 16.3.2006 at about 6.15 p.m. and prepared report (Ext. A-8)

(1) Abrasion 1c.m. x 1c.m. on front of right leg 3.5 c. m. below the right knee, clotted blood present.

(2) Abrasion .5 x .5 c.m. on front of right leg, 4 c.m. below the knee, clotted blood present.

(8) A report dated 29.5.2006 received from the forensic laboratory, which is part of the prosecution evidence on record, shows that the cloths of the accused and that of the victim were sent for chemical examination and it was found that in underwear (Article 6) of the accused and Pantee (Article 8) of the victim,

spermatozoa were found. Also, the said report confirms that there was human semen in both the articles. P.W. 8, M.S. Negi, Investigating Officer, in his statement on oath told the Court that he got sent the articles, after taking them into possession for chemical examination to the forensic laboratory.

(9) P.W. 1 Miss Preeti, cousin of Miss Sanjana (victim) has stated on oath that it was a day of HOLI and date was 15th when she saw at about 2.00-2.30 p.m. accused Jiya Lal taking Sanjana with him. The witness further states that she did not object taking Sanjana by the accused for the reason that on that day there were guests in her house and also for the reason that Sanjana was attached to the accused. This witness Preeti is a fifteen years old girl, whose presence at the place, from where she states to have seen the accused taking the girl, appears to be natural and her testimony is trustworthy. Sri Diwakar Chamoli, learned Amicus Curiae, on behalf of the appellant argued that name of this witness is not mentioned in the First Information Report as such her statement should not be believed. In our opinion, merely for non-mentioning of name of Preeti in the First Information Report as a witness her statement cannot be dis-believed, particularly, when her evidence is otherwise reliable. P.W. 1 Preeti had no enmity with the accused. This witness has stated that when the girl (deceased) did not return by the evening, a search was made for her. The witness further states that the family members made efforts to contact accused Jiya Lal, in the factory, where he used to work where it

was told that accused did come with Sanjana there but he is not traceable thereafter.

(10) Statement of P.W. 1 Preeti, gets full corroboration from the statement of P.W. 3, Budhiram, who also states that it was day of HOLI and the date was 15th March 2006. The witness (P.W. 3) further states that after playing HOLI, he was coming back to his house, when he saw Jiya Lal taking with him Sanjana. P.W. 3, Budiram further states that thereafter Sanjana was never seen alive. The witness in the opening sentence of his examination says that accused Jiya Lal used to sell ice-cream in his neighbourhood. He further states that Shiv Kumar (father of the deceased, Sanjana) was his neighbour. P.W. 3, Budhiram, has further told the Court that Sanjana was aged seven years only. The age of the deceased as mentioned by this witness gets corroboration also from the postmortem examination, wherein it is mentioned that the body was of a female child aged seven years.

(11) P.W. 2 Rajendra Singh, informant and uncle of the deceased, has stated that he lives in Kanwali Road in Dehradun. His niece Miss Sanjana (victim) was aged seven years. The witness further narrates that Sanjana was missing from 2 p.m. on 15.3.2006. The witness further told the trial court that even after search, she could not be found on that day. P.W. 2 Rajendra Singh, discloses that he was told by Budhiram that Jiya Lal was seen taking Sanjana with him. Next day morning this witness (Rajendra Singh) got lodged report (Ext. A-1) regarding missing of the girl. P.W. 2, Rajendra Singh states that after the report was lodged, dead body of the girl and cloths of the deceased were

recovered by the police in his presence and recovery memo (Ext. A-2) was prepared. This witness further states that police, after taking the dead body in their possession, prepared inquest report (Ext. A-3). Regarding the cloths recovered, he identified the same in the Court. The statement of this witness that Budhiram (P.W. 3) told him that he saw accused taking Sanjana with him gets corroboration from the report (Ext. A-1), in which it is mentioned that Budhiram told this witness regarding said fact. The statement of this witness further gets corroboration from the statement of P.W. 7, Sub Inspector R.K. Chouhan and that of P.W. 8, M.S. Negi, Investigating Officer, who were members of the police party and made recovery of the dead body and the cloths of the deceased from the vacant plot near Bhawani Inter College, at the pointing out of the accused.

(12) P.W. 7 Dr. R.K. Chouhan has stated that after the report was lodged regarding missing of Miss Sanjana, aged seven years at about 7.15 a.m. on 16.3.2006, the suspect Jiya Lal was taken to the Police Station at about 10.15 a.m. and was interrogated, on which he is said to have admitted having taken Sanjana with him and her murder after committing rape on her. In view of provisions of Section 26 of Indian Evidence Act, 1872, this part of statement of this witness is inadmissible in evidence. However, the statement of this witness regarding the fact that at the instance of the accused Jiya Lal, dead body of Miss Sanjana was recovered and cloths of the accused were recovered from a vacant plot near Bhawani Inter College, is admissible under Section 27 of the said act.

(13) P.W. 8 M.S. Negi, Investigating Officer, has also corroborated the recovery narrated by P.W. 7, Sub Inspector, R.K. Chouhan and P.W. 2, Rajendra Singh. This witness has proved the document prepared by the Police at the spot and the copies of the general diary in which endorsement is made regarding the aforementioned recoveries. P.W. 9 Constable, Virendra Singh is a formal witness, who has made entry in the general diary on 16.3.2006 at about 15.15 hours regarding the return of the police force to the Police Station along with Jiya Lal after the recovery is made. He has proved copy of the extract (Ext. A-19) relating to said entry.

(14) From the above discussions, all the links of the chain of circumstances mentioned above stand proved. In this regard, we are in agreement with trial court that the prosecution has been successful in proving the charge of offences punishable under Section 363, 376 and 302 of I.P.C.. However, as far as the offence punishable under Section 201 of I.P.C. is concerned, it is not proved that the accused Jiya Lal has caused dis-appearance of the evidence of the offence or if he has given false information to screen any culprit. Section 201 of Indian Penal Code provides that whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of offence to disappear, with the intention of screening the offender from the legal punishment, or with that intention gives an information respecting the offence which he knows or believes to be false, is, if the offence is punishable with death, liable to be punished with imprisonment which may extend to seven years and also liable to pay fine. Having gone through the entire evidence on record since no such evidence is there

which establishes the charge of offence punishable under Section 201 of I.P.C. against the accused, in our opinion, the trial court has committed error of law in convicting the accused Jiya Lal on the charge of offence punishable under Section 201 of I.P.C.. What has been proved on the record is that accused Jiya Lal, taking advantage of his attachment with the young girl aged seven years, kidnapped her and committed rape on her andwhile doing so caused her death by throttling. The medical evidence in the postmortem examination report (Ext. A-7) fully corroborates the prosecution story, as discussed earlier. As such, we are of the view that the trial court has rightly found accused Jiya Lal guilty of offences punishable under Section 363, 376 and 302 of I.P.C.. However, the trial court has erred in law in convicting the accused on the charge of offence punishable under Section 201 of I.P.C. from which he is liable to be acquitted for the reasons discussed above.

(15) Now, we come on the point of sentence. It is a shocking crime of committing rape on a young female child of seven years only, after kidnapping her taking advantage of the acquaintance with her and while doing so committing her murder. The victim was an innocent child having no enmity whatsoever with the accused and the crime has been committed sheer out of lust in an inhuman manner. As such as far as the sentence of imprisonment for life and to pay fine of Rs.5,000/- awarded under Section 376 of I.P.C. is concerned, we find the same to be just and proper in the circumstances of the case. Similarly, we also agree with the trial court that the punishment of imprisonment for a period of seven years and direction to pay fine of Rs.5,000/- under Section 363 of I.P.C. also meets the ends of justice. However, on the

point of sentence on the charge of offence punishable under Section 302 of I.P.C., we are of the view that imprisonment for life is a rule and sentence of death is exception. For affirmation of the sentence awarded by the trial court under Section 302 of I.P.C. we have to be satisfied whether it is a case of the category- ‘rarest of rare’ or not. From the above facts and circumstances and evidence on record, it appears that no deadly weapon has been used in commission of murder, which shows extra brutality to make it an exceptional case. Also, the leaned Amicus Curiae on behalf of the appellant submitted that the convict has no criminal history. He is so poor that he could neither engage a counsel of his choice before the trial court nor before this Court. He was provided counsel at the expenses of the State during the trial and also at the appellate stage. Learned Amicus Curiae further pointed out that accused Jiya Lal did not make attempt to abscond after commission of crime. He further submitted that on the day of HOLI in a drunken state he might have committed the murder to prevent the child from crying for help at the time of commission of rape. Considering all the facts and circumstances of the case, we are of the view that sentence of imprisonment for life would meet the ends of justice. As such it is not a case where only sentence of death would have been the just and proper sentence and we feel that the convict should have been sentenced imprisonment for life under Section 302 of I.P.C.

(16) Therefore, for the reasons as discussed above, we uphold the conviction of the accused Jiya Lal, recorded by the trial court under Section 363, 376 and 302 of I.P.C. We also uphold the sentence awarded by the trial court against the convict Jiya Lal under Section 363 and 376 of I.P.C. However the sentence of

death awarded to the convict under Section 302 of I.P.C. is set aside and reduced to imprisonment for life. Also, with regard to the conviction and sentence recorded by the trial court in respect of the offence punishable under Section 201 I.P.C. is set aside. Appeal to the extent stands allowed. Accused Jiya Lal stands acquitted of charge of offence punishable under Section 201 of I.P.C.. He shall undergo sentences awarded by the trial court under Sections 363 and 376 of I.P.C. and also the sentence of imprisonment for life awarded by this Court under Section 302 of I.P.C.. Accordingly, appeal stands disposed of. And, the reference stands answered. Information be sent to the trial court and the Superintendent of the jail where the convict is lodged.

(Dharam Veer, J.) **(Prafulla C. Pant, J.)**

Dt. April 2, 2007

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